the hearing of the application in chambers. Having heard all the further arguments in the matter I still feel that that is the correct view. I do not, therefore, propose to make any alteration in the order which I made in chambers.

Before concluding the matter I must refer to the final argument put forward by Mr. Shankar which was in relation to the inherent jurisdiction of the court. Mr. Shankar argued that the circumstances of this case are such that in the exercise of its inherent jurisdiction the court should make the order sought. I agree that this is a case in which the plaintiff has been compelled to satisfy a judgment against the partnership firm for a large sum, but in the absence of any proof that the counterclaim which the defendant has set up by way of a set off is frivolous and unsubstantial, it would be wrong for the court to grant the plaintiff any relief in the guise of the inherent jurisdiction of the court to the detriment of the defendant. The accounts of the partnership have not been finalized and it will be wrong for the court to make any order granting relief to the plaintiff at this stage of the proceedings.

Costs in the cause.

Order accordingly.

Solicitors: *Shearn Delamore & Co.*; *Shook Lin & Bok.*

MOHAMED BIN JAMAL v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Tan Ah Tah F.J. & Chua J.) April 6, 1964]

[Singapore — Federal Court Criminal Appeal No. 18 of 1963]

Criminal Procedure — Appeal — Additional evidence — Principles on which Federal Court will act in exercising its discretion whether to allow fresh evidence to be called — Exceptional circumstance to justify admission of additional evidence.

Penal Code ss. 300 Exception 7, 302 & 304 — Murder — Diminished responsibility — Counsel's ignorance of existence of defence — Whether exceptional circumstance.

It is only in the most exceptional circumstances, and subject to exceptional conditions that the appellate court is ever willing to listen to additional evidence. These exceptional conditions are (i) the evidence that it is sought to call must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be evidence which is credible evidence in the sense that it is well capable of belief; (iv) the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

The ignorance of counsel who defended the appellant at the trial as to the very existence of one of the principal statutory defences available to a person charged with murder was a wholly exceptional circumstance which fell within the first of the exceptional conditions mentioned above and therefore leave to call additional evidence should be granted.

Observation duty of counsel where mental condition of the appellant (accused) invited some inquiry.

Cases referred to:—

(1) *R.* v. *Jordan* (1956), 40 Cr. App. 152, 154.

(2) *R.* v. *Parks* [1961] 3 All E.R. 633, 634; 1961 1 W.L.R. 1484.

FEDERAL COURT.

D. E. S. Chelliah for the appellant.

Tan Boon Teik (Solicitor-General) for the respondent.

Thomson L.P.: This appellant was convicted in the High Court in Singapore on 10th October, 1963, on three charges of murder in contravention of section 302 of the Penal Code. He applied for leave to appeal against these convictions and for leave to call additional evidence. On 26th February, 1964, we granted him leave to call certain evidence as to the state of his mind. We then proceeded to treat his application for leave to appeal as an appeal and heard the evidence of Dr. Yap Meow Foo. In the event we set aside the three convictions for murder and substituted for them convictions for culpable homicide not amounting to murder in contravention of section 304 of the Penal Code and imposed a sentence of life imprisonment in respect of each such conviction. We stated that we would give our reasons for the course we took at a later stage and we now proceed to do so.

The facts of the case were never in any real dispute. The appellant and one Chenchal Singh had been employed as watchmen on a building estate in Singapore, but the appellant had ceased to be so employed though he continued to live on the estate. The two men were not friends and on the evening of 5th April, 1963, they had some sort of quarrel over allegations that Chenchal Singh had damaged the appellant's boot and put sand in his rice bowl. Early the following morning the appellant went to the partially completed house where Chenchal Singh was living with his wife and family and killed Chenchal Singh, his wife Gurnam Kaur and his son Harban Singh. He did so by inflicting most terrible injuries upon them with a "parang". He disappeared but was arrested some eleven weeks later on another building estate where he had found employment.

The appellant was committed for trial on three charges of murder in contravention of section 302 of the Penal Code and after some preliminary objection by the defence Winslow J. held that the three charges should be tried together.

The trial commenced on 7th October, 1963. Eighteen witnesses gave evidence for the prosecution and the appellant gave evidence on his own

behalf. In view of the course the case has taken it is unnecessary to deal with the evidence in detail. It is only necessary to observe that no evidence was called for the defence as to the mental condition of the appellant nor was any question having any bearing on the subject addressed either to a medical witness who had examined the appellant for injuries or of any of the other witnesses.

On the third day of the trial, after the conclusion of the evidence, counsel for the appellant addressed the jury and from the trial judge's summing up it is clear that in addition to what appeared to be the main defences, that is that the case for the prosecution was not sufficiently proved, and/or that there was provocation and/or the appellant was acting in the exercise of his right of private defence, he raised the questions of insanity and diminished responsibility.

The following day the trial judge charged the jury in a long and careful summing up that has not been in any way criticised before us and in the course of which he dealt with the question of diminished responsibility in terms which counsel for the appellant has agreed are both fair and adequate. In the event the jury returned a unanimous verdict of guilty on each of the three charges and the appellant was accordingly convicted and sentenced to death.

While he was in prison the appellant was minded to appeal and apparently was unwilling or unable to retain the services of counsel who had appeared for him at the trial. He accordingly intimated through the jailor that he wished to appeal on the ground that "the conviction is unreasonable". That intimation was properly treated as an application for leave to appeal and the matter being a capital one counsel was assigned by the court who proceeded to file a notice setting out a very great number of grounds of appeal of no great substance which it is not necessary to relate here.

At the same time he applied for leave to call the evidence of Dr. Yap Meow Foo. This application was supported by two affidavits.

The first of these was by Dr. Yap which stated that he is a Doctor of Medicine of the University of Hongkong and holds the Diploma in Psychological Medicine of the University of London and is the Medical Superintendent of the local hospital for the treatment of persons who suffer from mental illnesses. He had examined the appellant in prison on 6th December, 1963, about two months after the trial, and had had him under observation in his mental hospital subsequently for some 6 weeks. He considered that the appellant had an abnormal brain structure as a result of which he suffered from a condition of arrested or retarded development of mind which was such as substantially to impair his mental responsibility for his acts.

The second affidavit was by counsel who defended the appellant at his trial. It contained the following statement:—

> "Until the 9th day of October, 1963 I was unaware that the defence of diminished responsibility applied in Singapore and that is the only reason why I did not call medical evidence in support of the defence of diminished responsibility under *Exception* 7 to section 300 of the Penal Code."

It then goes on to state what steps that counsel took after this interesting discovery on the third day of the trial. He spoke to the prison doctor on the telephone and was informed that that gentleman

> "had made no observations on the appellant above-named from the point of view of giving evidence to show that the appellant above-named was suffering from such abnormality of mind....at the time the offences were committed as substantially impaired his mental responsibility for his acts....".

The prison doctor also informed him that a Dr. Winslow of the mental hospital had examined the appellant but although counsel went to that hospital he was unable to see any doctor there. He "did not consider it to be in the best interest of the appellant....to apply for an adjournment to call medical evidence in support of the defence of diminished responsibility....because" he "did not know what the medical evidence, even if it were called, would prove". He did, however, refer to the defence of diminished responsibility at length in his closing address to the jury.

The appellate courts of which this court is the successor have always adopted the same attitude as has been adopted by the English Court of Criminal Appeal to applications to call additional evidence. That attitude was shortly and clearly stated by Hallett J. in the case of *Jordan* [1] as follows:—

> "It is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the court is ever willing to listen to additional evidence."

The latest statement regarding these exceptional conditions is to be found in the following passage from the judgment of Lord Parker C.J. in the case of *R.* v. *Parks* [2]:—

> "First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

In the present case Dr. Yap's evidence clearly satisfies the second, third and fourth of

these conditions. It could not be more relevant to the issue of diminished responsibility. It is well capable of belief because it is the professional evidence of a professional man of some small eminence in relation to the subject of which he speaks and taken with the other evidence in the case it would clearly have had a very considerable influence on the mind of any reasonable jury.

The only difficulty is as to whether it satisfies the condition, that is to say it was not available at the trial. In a strictly literal sense, of course, that is made out. It was not available at the trial in the sense that at the time of the trial Dr. Yap had never even set eyes on the appellant. That, however, is not enough. On the depositions it must have been clear from the nature of the killings that, to put it at the lowest, the mental condition of the appellant invited some inquiry. In the circumstances it was the duty of counsel to ensure that some sort of examination was made by a competent medical man to ascertain whether there was any what might be called medical material to show that such a defence as diminished responsibility was available and if there was such medical evidence then it was the duty of counsel for the defence to call it. We would therefore normally be extremely reluctant to say that evidence was not available simply because a medical man had not been consulted until after the trial when he or somebody equally competent could have been consulted before it.

In the present case, however, we had the extraordinary state of affairs that defence counsel embarked upon, and almost up to the end continued in, his duties in a state of complete ignorance as to an important statutory defence to a charge of murder. We are not suggesting for one moment that any ignorance of the law on the part of counsel should necessarily avail a prisoner anything in every case. The law relating to murder, however, is the most fundamentai portion of all our law. It governs the conditions in which society may take away life; an error in its application may be such that it can never be repaired. The offence is set out in black and white in the Penal Code, as are the principal defences available to a person charged with it, and everything that goes to make up justice demands that we should treat ignorance of the very existence of one of these defences as such a wholly exceptional circumstance as to justify our doing anything possible within the limits of our statutory powers to ensure that such a circumstance has not led to error. For that reason we granted leave to call Dr. Yap before us to give evidence and at that stage we were much assisted by the Solicitor-General stating that the prosecution would not wish to call any rebutting evidence, although of course they reserved their right to cross-examine Dr. Yap.

Later we heard the evidence of Dr. Yap which fully substantiated everything contained in his affidavit and was not in any way shaken in cross-examination. In the event we found ourselves compelled to a very firm view to the effect that had that evidence together with the evidence as to the nature of the killings been before the trial court and had the law relating to the incidence and quantum of proof been correctly stated to the jury (as it was) then no reasonable jury could possibly have come to any conclusion other than that the defence of diminished responsibility was made out.

In the circumstances we did not think we were justified in ordering a re-trial but considered it proper to quash the convictions for murder, to substitute convictions for culpable homicide not amounting to murder and to impose a sentence of life imprisonment in respect of each conviction.

Convictions for murder quashed; Convictions for culpable homicide not amounting to murder substituted, and sentence of life imprisonment imposed.

Solicitors: *Drew & Napier.*

KECK SENG & CO. LTD. v. ROYAL EXCHANGE ASSURANCE

[O.C.J. (Ambrose J.) April 24, 1964]

[Singapore — Suit No. 716 of 1962]

Insurance — Marine insurance — Policy insuring bags of sugar — Damage to sugar — Whether damage due to inherent vice — Whether policy insured against damage due to inherent vice — Whether policy insuring against damage by sweating covered damage due to inherent vice — Meaning of "sweat".

This was a claim on a policy of marine insurance. The policy insured 4980 bags of white sugar shipped from Dairen to Singapore. The risks covered by the policy included the risk of damage by rain or fresh water, sea water and sweating but subject to the Institute Cargo Clauses (All Risks). Clause 6 of the Institute Cargo Clauses (All Risks) provides as follows:— "This insurance is against all risks of loss of or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured...."

On arrival in Singapore 3849 bags were found to be partly damaged by becoming wet.

Held: (1) the cause of the damage was the inherent vice of the sugar of absorbing moisture from the atmosphere;

(2) the policy was subject to clause 6 of the Institute Cargo Clauses (All Risks) and did not cover loss or damage caused by inherent vice or nature of the subject-matter insured;

(3) by virtue of section 5(1) of the Civil Law Ordinance, the defendants could invoke section 55(2)(c) of the Marine Insurance Act, 1906, which provides that,